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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

GRANT KELLER et al., Plaintiffs and Appellants, v. CALIFORNIA HIGHWAY PATROL et al., Defendants and Respondents.	B201064 (Los Angeles County Super. Ct. No. SC086615)

APPEAL from a judgment of the Superior Court of Los Angeles County. Patricia L. Collins, Judge. Affirmed.

Robert B. Amidon for Plaintiffs and Appellants.

Edmund G. Brown, Jr., Attorney General, James M. Schiavenza, Assistant Attorney General, Joel A. Davis and Donna M. Dean, Deputy Attorneys General, for Defendants and Respondents.

Grant and Mary Elizabeth Keller appeal for themselves and on behalf of the estate of their late son, Aaron Keller, from the judgment dismissing their complaint against the California Highway Patrol (CHP) and its commissioner, Michael Brown, for causing the death of their son during a highway patrol officer's high speed pursuit of a driver in West Hollywood. Because the CHP's written vehicle pursuit policy gives the highway patrol statutory immunity, we affirm.

FACTS AND PROCEEDINGS[1]

On a weekend evening in August 2003, California Highway Patrol Sgt. Dennis Frias was driving an unmarked car on Sunset Blvd. between Highland Ave. and Crescent Heights Blvd. in Los Angeles and West Hollywood. He was part of a joint task force with the Los Angeles Police Department (LAPD) and Los Angeles County Sheriff's Department formed to curb excessive cruising by cars on Sunset Blvd. He saw a Volkswagen convertible with three young men commit a minor traffic violation by passing to the right of a car containing several young women, with whom the young men were flirting. Sgt. Frias switched on his emergency light, signaling the Volkswagen to pull over. (Veh. Code, § 2400 [CHP jurisdiction includes all public highways]; § 360 ["highway" includes city surface streets].) Instead of stopping, the Volkswagen sped away. Sgt. Frias and a highway patrolman on motorcycle pursued the Volkswagen at speeds of between 70 and 100 miles an hour. With the patrolmen close behind in pursuit, the Volkswagen ran a stop sign and broadsided Aaron Keller's car, killing him and his passenger.

Aaron's parents, appellants Grant and Mary Elizabeth Keller, filed a lawsuit in United States District Court alleging violation of Aaron's civil rights (42 U.S.C. § 1983 (section 1983)) and related state law torts. Their suit named as defendants the CHP (but

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[1] Because the sole cause of action against Commissioner Brown is one for injunctive relief predicated on substantive allegations against the CHP, we include Commissioner Brown when we refer to CHP.

not Commissioner Brown), the two patrolmen involved in the pursuit, and others. The district court dismissed the civil rights claim because the complaint did not allege the defendants "intended to harm" Aaron. Having dismissed the only federal law claim, the district court exercised its discretion to dismiss the remaining state law claims and entered judgment for all defendants.[2] The Ninth Circuit Court of Appeals affirmed the dismissal.

While the federal appeal was pending, appellants filed a parallel state court complaint alleging violation of Aaron's civil rights and state law torts. In addition to naming the highway patrol as a defendant, the state complaint also sued Commissioner Michael Brown. The complaint also named as defendants Sgt. Frias, the motorcycle patrolman, Los Angeles Police Chief William Bratton, Los Angeles County, Los Angeles County Sheriff Department, and Los Angeles County Sheriff Leroy Baca. None of the defendants other than the highway patrol and Commissioner Brown is a party to this appeal, each of them having been dismissed after successfully demurring to the complaint.[3]

CHP also demurred to the complaint. It argued the federal court's dismissal of appellants' federal civil rights claim was res judicata. It also argued the CHP's written vehicle pursuit policy made it statutorily immune under Vehicle Code section 17004.7 (section 17004.7) for Aaron's death. The trial court sustained on two grounds the demurrer to the federal civil rights claim without leave to amend: the federal dismissal was res judicata, and appellants did not allege the CHP intended to harm Aaron. The court sustained the demurrer to the state tort claims with leave to amend to give

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[2] The district court also dismissed the lawsuit based on the Eleventh Amendment to the United States Constitution and principles of sovereign immunity.

[3] The court sustained the demurrers by the county defendants because appellants had not complied with the Tort Claims Act and the federal district court's dismissal of the civil rights claim was res judicata. It sustained the demurrer by Los Angeles Police Chief Bratton because the complaint did not allege any conduct by him. It sustained the demurrers of Sgt. Frias and the motorcycle patrolman based on statutory immunity. Appellants do not challenge any of these dismissals on appeal.

appellants the chance to plead around, if they could, the statutory immunity of section 17004.7 (which we discuss below).

Appellants filed a second amended complaint. The gist of their complaint remained unchanged: The CHP's high speed pursuit of the fleeing Volkswagen caused the accident that killed their son. But the complaint also contained a new allegation that the CHP's written vehicle pursuit policy in effect when Aaron was killed differed from judicially approved earlier versions of the policy. Appellants also alleged the joint anticruising task force to which Sgt. Frias was assigned the night of Aaron's death did not have a written vehicle pursuit policy, which section 17004.7 immunity required.

The CHP demurred to the second amended complaint. It argued appellants had not managed to plead around the statutory immunity the CHP enjoyed for adopting a written vehicle pursuit policy. In support, the CHP filed a request for judicial notice of its written vehicle pursuit policy in effect in 1997 and unchanged since then except for minor alterations to the "reporting requirements." The record does not contain an express ruling by the trial court on the CHP's request for judicial notice, but appellants' opposition to the CHP's demurrer referred without objection to the policy. We therefore assume the trial court in fact took judicial notice of the pursuit policy. The court sustained the demurrer without leave to amend. It noted that three appellate court decisions had found the CHP's written vehicle pursuit policy complied with section 17004.7. Because appellants had failed to plead around the CHP's statutory immunity, appellants' claims failed. The court therefore dismissed the complaint against the highway patrol and Commissioner Brown. This appeal followed.

STANDARD OF REVIEW

" 'We treat [a] demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient

to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the [appellant]." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

DISCUSSION

1. The Complaint and Judicially Noticed Facts Establish CHP's Immunity

A. Appellate courts have consistently held that the adoption of CHP's pursuit policy grants CHP statutory immunity.

The CHP has a written vehicle pursuit policy of which the trial court, and we, may take judicial notice. It was attached to the demurrer to the second amended complaint. If a complaint and judicially noticed facts reveal the existence of a statutory immunity, the complaint must plead around the immunity. (*Gentry v. eBay, Inc.* (2002) 99 Cal.App.4th 816, 824; *Keyes v. Santa Clara Valley Water Dist.* (1982) 128 Cal.App.3d 882, 885-886; see also *Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 796.) Section 17004.7, subdivision (b)(1) provides:

> "A public agency employing peace officers that adopts and promulgates a written policy on . . . vehicular pursuits complying with subdivisions (c) and (d) is immune from liability for civil damages for personal injury to or death of any person or damage to property resulting from the collision of a vehicle being operated by an actual or suspected violator of the law who is being, has been, or believes he or she is being or has been, pursued in a motor vehicle by a peace officer employed by the public entity."

Determining whether the CHP's policy complies with section 17004.7 is a question of law. (§ 17004.7, subd. (f).) Subdivision (c) establishes the minimum standards the policy must meet to bestow immunity on the law enforcement agency.[4] Three published decisions have either concluded or taken for granted that the CHP's pursuit policy satisfies the requirements for statutory immunity: *Weaver v. State of California* (1998) 63 Cal.App.4th 188, 201 (*Weaver*); *Ketchum v. State of California* (1998) 62 Cal.App.4th 957, 967-970 (*Ketchum*); and, *Kishida v. State of California* (1991) 229 Cal.App.3d 329, 334 (*Kishida*).[5] We see little value in replowing the ground those decisions have already covered in establishing that the CHP's policy complied with the statute.

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[4] Section 17004.7, subdivision (c) states, "A policy for the safe conduct of motor vehicle pursuits by peace officers shall meet all of the following minimum standards: [¶] (1) Determine under what circumstances to initiate a pursuit. . . . [¶] (2) Determine the total number of law enforcement vehicles [including supervisors] authorized to participate in a pursuit. . . . [¶] (3) Determine the communication procedures to be followed during a pursuit. . . . [¶] (4) Determine the role of the supervisor in managing and controlling a pursuit. . . . [¶] (5) Determine driving tactics and the circumstances under which the tactics may be appropriate. [¶] (6) Determine authorized pursuit intervention tactics. . . . [¶] (7) Determine the factors to be considered by a peace officer and supervisor in determining speeds throughout a pursuit. . . . [¶] (8) Determine the role of air support, where available. . . . [¶] (9) Determine when to terminate or discontinue a pursuit. . . . [¶] . . . [¶] (10) Determine procedures for apprehending an offender following a pursuit. . . . [¶] (11) Determine effective coordination, management, and control of interjurisdictional pursuits. . . . [¶] . . . [¶] (12) Reporting and postpursuit analysis . . . ."

Section 17004.7, subdivision (b), which confers immunity, also refers to subdivision (d) of the statute. This provision deals with law enforcement training. Appellants do not appear to base any of their claims on a failure to train.

[5] *Kishida* is the decision that one might more accurately describe as having taken the policy's satisfaction of section 17004.7 for granted. That decision involved an appeal from summary judgment where the plaintiff did not dispute the CHP's evidence that its policy satisfied the statute -- the issue on appeal was whether a highway patrolman had followed the policy.

B. The April 16, 2003 memo is largely immaterial.

In conjunction with the multi-agency task force that included the CHP and other law enforcement agencies, the CHP prepared an internal memorandum, dated April 16, 2003, entitled "Request for Assistance with Cruising Abatement from the Los Angeles Police Department and the Los Angeles County Sheriff's Department." The memo describes LAPD and sheriff requests for CHP assistance to abate gridlock problems in the City of West Hollywood. Sgt. Frias was assigned to that task force on the night of the collision here. Part XIII of the memo is entitled, "Pursuit Policies" and consists of five sentences which we set out in the margin.[6]

Throughout the trial court proceedings, and in the briefs filed in this court, appellants have maintained that Part XIII of the memo is the policy that applies in this case, that Part XIII does not comply with section 17004.7, and hence no immunity attaches to the pursuit in question. For example, in the second amended complaint, appellants attached the April 16, 2003 memo as an exhibit and alleged that the memorandum "has never been submitted to any Superior Court or other court of the United States for the purposes of determining whether its policies, including pursuit policies, comports with California Vehicle Code, § 17004.7." By referring to a claimed new and different policy, this allegation was apparently intended to avoid the Court of Appeal decisions in *Weaver*, *supra*, 63 Cal.App.4th at page 201; *Ketchum*, *supra*, 62 Cal.App.4th at pages 967-970; and, *Kishida*, *supra*, 229 Cal.App.3d at page 334.

The argument that Part XIII of the memo is not in compliance with section 17004.7 misses the point. First, there is nothing in the April 16, 2003 memo that suggests it was intended as a pursuit policy within the immunity statute. On the contrary,

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[6] "Departmental pursuit policies will remain in effect throughout the duration of the operation. Pursuit critiques will be prepared by the on scene supervisors and turned into either the Central Los Angeles Area or West Los Angeles Area, depending on the location of occurrence, for review and processing. Pursuits on city streets will be turned over to either LAPD or LASD as soon as possible. Pursuits on freeways will remain under the control of the CHP. The supervisors assigned to the detail will be responsible form [*sic*] completing the pursuit report."

its title, which refers to the request of the LAPD and Sheriff to assist in the abatement program, belies this interpretation. The judicially noticed materials show that the relevant pursuit policy is found in part of a 26-page document entitled "Patrol Vehicle Operations" which appears as Chapter 5 of the lengthy Highway Patrol Manual 70.6. It is that pursuit policy that has been in effect without material change since June 3, 1997, and it is the pursuit policy contained in Chapter 5 that affords immunity here.[7]

Second, even if Part XIII of the April 16, 2003 memo could be treated as a new pursuit policy, our immunity analysis would not change. The first sentence of Part XIII states: "Departmental pursuit policies will remain in effect throughout the duration of the operation." If Part XIII of the memo is a separate pursuit policy then it expressly includes all the policies set forth in Chapter 5 of Highway Patrol Manual 70.6.

C. The failure to conduct an evidentiary hearing was not error.

At various times in the trial court and in their briefs filed here, appellants ask for some sort of evidentiary hearing. It is not altogether clear what the hearing is intended to accomplish but three distinct subjects seem to be implicated: (1) whether CHP actually complied with the pursuit policy in the high speed chase on the night in question; (2) the significance of the redactions to Chapter 5 of Highway Patrol Manual 70.6 that the trial court judicially noticed; and (3) the "status and scope of this joint venture among police organizations." We conclude no evidentiary hearing was or is warranted on any of the subjects suggested by appellants.

First, appellants do not come to terms with the effect the CHP's pursuit policy has on their lawsuit. Instead, they ask for an evidentiary hearing under Code of Civil Procedure section 909 to receive evidence of Sgt. Frias's violations of the policy. (Code Civ. Proc., § 909 [permits reviewing court under certain circumstances to receive

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[7] The only change in the text of Chapter 5 of the Highway Patrol Manual since June 3, 1997, apparently dealt with reporting procedures; that part of the manual is not involved in the present litigation. Appellants make no claim that the present Chapter 5 pursuit policy filed with the court materially varies from that considered in the three appellate cases cited in the text.

evidence and make factual findings].) They allege they can prove that Sgt. Frias targeted the Volkswagen because its occupants were African-American. They further allege they will show that Sgt. Frias drove recklessly by speeding on congested city streets on a weekend night, and negligently failed to abort the pursuit when its risks outweighed the danger of letting the Volkswagen escape. No evidentiary hearing is necessary, however, because in reviewing a demurrer we assume the truth of appellants' allegations. (*Blank v. Kirwan*, *supra*, 39 Cal.3d at p. 318.) As the trial court expressly acknowledged even if one assumes Sgt. Frias violated the pursuit policy, his violations do not prevent section 17004.7's application here. "The statute is clear: if the agency adopts a pursuit policy which meets the statutory requirements, then immunity results. The extent to which the policy was implemented in general and was followed in the particular pursuit is irrelevant." (*Brumer v. City of Los Angeles* (1994) 24 Cal.App.4th 983, 987; see also *Nguyen v. City of Westminster* (2002) 103 Cal.App.4th 1161, 1167; *Kishida*, *supra*, 229 Cal.App.3d at p. 335.)

Second, appellants suggest that the redactions to Chapter 5 of the Highway Patrol Manual 70.6 might somehow reveal that the pursuit policy is actually out of compliance with section 17004.7, and that the trial judge should have conducted an *in camera* hearing. Portions of the policy were redacted, according to a CHP custodian of records, in order not to jeopardize officer safety. Appellants' reference to "*in camera* hearing" appears to acknowledge that officer safety concerns were legitimate. The defect in appellants' argument is that they never asked the trial court to conduct an *in camera* hearing, did not object to judicial notice of the redacted version, and in fact attached the pursuit policy to documents they submitted to the court. Any claim that the court improperly considered the redacted version or did not conduct an evidentiary hearing on the subject is thus waived. (*Baugh v. Garl* (2006) 137 Cal.App.4th 737, 746 ["Points not raised in the trial court may not be raised for the first time on appeal"].) Even if appellants had properly preserved the issue, they have not explained how the various redacted subparts of the pursuit policy would demonstrate that an otherwise compliant policy would show lack of compliance. At most, the redacted portions might shed some

light on whether Sgt. Frias or the other patrolman complied with some of the detailed elements of the pursuit policy, but, as we have already observed, compliance or noncompliance by an officer in the field is not relevant to whether the immunity attaches to officer conduct. (*Brumer v. City of Los Angeles*, *supra*, 24 Cal.App.4th at p. 987; *Nguyen v. City of Westminster*, *supra*, 103 Cal.App.4th at p. 1167; *Kishida*, *supra*, 229 Cal.App.3d at p. 335.)

Finally, we do not see how an evidentiary hearing into the "status and scope of this joint venture among police organizations" would have any bearing on the correctness of the trial court's ruling on demurrer. It was the CHP that successfully demurred, not the joint task force, which has not been a party to this litigation. It is the CHP's pursuit policy, not the scope or status of the task force, that affords immunity.

2. Appellants Show No Exceptions to Immunity

Appellants make three separate arguments why, even if CHP would generally be immune from liability, the immunity statute is not applicable in this situation. We reject each one:

- Appellants urge application of what they call a "*Kennedy v. City of Ridgefield* analysis." (*Kennedy v. City of Ridgefield* (9th Cir. 2006) 439 F.3d 1055, 1057-1058.) Their analysis posits a civil right in physical safety, which they contend a law enforcement agency violates by creating a danger that would not have existed but for the agency's conduct. Appellants contend that principle applies here because the patrolmen's high speed pursuit of the Volkswagen created the danger of the Volkswagen's collision with Aaron that would not have existed but for the patrolmen giving chase to the fleeing vehicle. None of the authorities appellants cite for their contention involved vehicle pursuits. In *Kennedy*, a police officer failed to warn the plaintiff that the officer had told the plaintiff's neighbor that the plaintiff had accused the neighbor of being a child molester even though the officer promised he would give the plaintiff such a warning. Learning of the accusations, the neighbor shot the plaintiff. The question in *Kennedy* was whether the officer was entitled to qualified immunity (it concluded immunity did not

apply), but the *Kennedy* court found the police department itself, like the CHP here, did not violate the plaintiff's civil rights under section 1983. (*Kennedy*, at p. 1059.) In *Porter v. Osborn* (9th Cir. 2008) 546 F.3d 1131 (*Porter*), an Alaska state trooper using poor judgment and bad tactics shot and killed a motorist while investigating the motorist's suspicious presence parked along a state highway. The *Porter* court found the trooper was not liable for violating the motorist's civil rights unless the trooper's intended purpose was to harm the motorist for reasons unrelated to legitimate law enforcement objectives. (*Id.* at p. 1142.)[8]

Appellants do not allege Sgt. Frias or the other patrolman *intended* to harm Aaron, regardless of how reckless they might believe either to have been. Accordingly, their contention fails. (*County of Sacramento v. Lewis* (1998) 523 U.S. 833, 834 [officer "causing death through deliberate or reckless indifference to life in a high-speed automobile" violates person's constitutional rights "only [when the officer's] purpose [is] to cause harm unrelated to the legitimate object of arrest"]; accord *Scott v. Harris* (2007) 550 U.S. 372 [no liability where officer acted reasonably in ending a high speed pursuit by applying his push bumper to the rear of the fleeing vehicle, causing it to crash and paralyzing driver].)

At bottom, appellants do not grapple with the danger inherent in most, if not all, high speed police pursuits. Sadly, high speed pursuits often expose innocent members of the public such as Aaron to danger that presumably would not exist but for the police choosing to pursue the fleeing vehicle. Sometimes those pursuits, as here, end

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8 Appellants also cite a two-decade-old case, *Woods v. Ostrander* (9th Cir. 1989) 879 F.2d 583, 586, that applied the lower standard of "deliberate indifference" for imposing liability on a police officer's purported violation of section 1983. In *Woods*, an officer impounded a drunk driver's car and left the driver's female passenger stranded by the roadside at night in a high crime area. The *Woods* court found the officer was liable to the passenger when a later passerby raped her. *Porter* establishes, however, that in the years since *Woods* was decided, a more exacting standard of "purpose to harm" has replaced *Woods*' deliberate indifference standard when law enforcement interacts with citizens in circumstances involving quick judgment calls, such as high speed chases. (*Porter*, *supra*, 546 F.3d at pp. 1137-1138.)

tragically. But the existence of the statutory immunity -- indeed one of its very purposes -- means the police are not liable for injuries arising from the pursuit. The Legislature has determined that public policy is furthered by the rule of immunity, even in the face of occasional terrible consequences and individual loss. We are not free to rewrite that policy.

- Appellants contend the CHP's policy does not comply with the statute. In support, they cite a line of cases that stand for the proposition that the policy must meaningfully guide the decisions of an officer in initiating, continuing, and ending a pursuit. The policy cannot simply leave those decisions, in effect, to the officer's "best judgment." (*Colvin v. City of Gardena* (1992) 11 Cal.App.4th 1270, 1282.) "To confer immunity, a pursuit policy 'must do more than simply advise the pursuing officers to exercise their discretion and use their best judgment . . . . [¶] A policy which merely memorializes the unfettered discretion to initiate or terminate a pursuit or which allows each officer to use his or her own subjective standards for determining when a pursuit should be initiated, continued or terminated' " does not satisfy the statute's requirements. (*Berman v. City of Daly City* (1993) 21 Cal.App.4th 276, 281-282.) But the CHP's policy does not leave patrolmen with unfettered discretion, a finding reiterated in three published Court of Appeal decisions. (*Weaver*, *supra*, 63 Cal.App.4th at p. 201; *Ketchum*, *supra*, 62 Cal.App.4th at pp. 967-970; *Kishida*, *supra*, 229 Cal.App.3d at p. 334.)

- Finally, appellants allege Sgt. Frias was not working as a highway patrolman the night of Aaron's death, but as a member of the anticruising task force which did not have a written vehicle pursuit policy. They rest their contention on a theory that melds principles of agency law governing private parties to notions of governmental immunity. Appellants describe the CHP as "a partner and/or joint venture with municipalities" in its participation in the task force. From that description, appellants assert the CHP ought not to enjoy immunity under its pursuit policy because it was coordinating its efforts with the LAPD and sheriff department. Appellants do not square that assertion, however, with their allegation that the patrolmen, police officers,

and deputy sheriffs assigned to the task force were under orders to adhere to the vehicle pursuit policies of their own law enforcement agencies, rather than the nonexistent policy of the task force. Moreover, the authorities they cite for their argument are inapt. *McKee v. Los Angeles Interagency Metropolitan Police Apprehension Crime Task Force* (2005) 134 Cal.App.4th 354, 359 held that a multi-agency task force is a "local agency" under the Brown Act (Gov. Code, § 54950 et seq.) governing government's obligation to conduct its business in public. The second decision appellants cite, *Hervey v. Estes* (9th Cir. 1995) 65 F.3d 784, 792, is equally inapt because it applied Washington state law to find an "intergovernmental association" was not a local governmental entity subject to a lawsuit under section 1983 of title 42 of the United States Code. At most, appellants' argument would support a theory of liability against the interagency task force, but no claims against that entity are made in the complaint.

DISPOSITION

Judgment for respondents California Highway Patrol and Commissioner Michael Brown is affirmed. Respondents to recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

RUBIN, ACTING P. J.

WE CONCUR:

BIGELOW, J.

BAUER, J.*

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* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.